



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON, D.C. 20370-5100

JRE  
Docket No: 3940-99  
11 October 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 28 September 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the rationale of the hearing panel of the Physical Evaluation Board which considered your case on 22 June 1999, copy of which is attached. The Board was not persuaded that your condition was ratable above 40% disabling at the time of your permanent retirement. It noted that a 60% rating for intervertebral disc syndrome, which is the highest schedular rating for that condition, requires objective findings of a pronounced, i.e., greater than severe, condition with persistent, objectively verified symptoms, and little intermittent relief. Your condition did not meet those criteria. It appeared to the Board that the Department of Veterans Affairs awarded you a 60% rating under code 5293 based largely on your subjective complaints, rather than objective findings.

The alleged procedural and due process irregularities which you believe occurred in your case were not considered probative of the existence of material error or injustice, because you have not demonstrated that you were entitled to a higher disability rating, or that you would have received such a rating had the alleged irregularities not occurred. You were afforded a full and fair hearing, and the findings of the hearing panel are supported by the available records. Accordingly, your application has been denied. The names and votes of

the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER  
Executive Director

Enclosure

[REDACTED]

**RATIONALE:**

THE MEMBER IS A 36 YEAR OLD AW1, USN(RET) WITH ABOUT 12 YEARS OF SERVICE AT THE TIME HE WAS PLACED ON THE TDRL ON 28 MAY 1994 WITH A DISABILITY RATING OF 40% UNDER V.A. CODE 5293 FOR THE DIAGNOSES:

- (2) MECHANICAL LOW BACK PAIN AND RADIATING PAIN INTO RIGHT LEG; AND CATEGORY II -
- (1) STATUS POST HERNIATED DISK AT L4-5 AND L5-S1 LEFT WITH STATUS POST SURGICAL DECOMPRESSION WITH EXCELLENT RESOLUTION OF LEFT LEG RADICULOPATHY.

THE MEMBER UNDERWENT TDRL EVALUATIONS ON 8 JULY 1996 AND 1 NOVEMBER 1997 AT THE NATIONAL NAVAL MEDICAL CENTER. THE PEB RECORD REVIEW PANEL CONSIDERED THE CASE ON 1 DECEMBER 1997 AND FOUND THE MEMBER UNFIT FOR DUTY BECAUSE OF PHYSICAL DISABILITY AND RATABLE AT 40% UNDER V.A. CODE 5293 THAT WAS CONSIDERED PERMANENT. THE MEMBER DISAGREED WITH THIS FINDING AND DEMANDED A FORMAL HEARING.

A FORMAL HEARING WAS ORIGINALLY SCHEDULED FOR 3 MARCH 1998. HOWEVER, JUST BEFORE THAT HEARING WAS TO BE CONVENED, THE HEARING PANEL WAS INFORMED BY THE MEMBER'S CHOSEN REPRESENTATIVE, MS. TORI JOYNER, NATIONAL SERVICE OFFICER OF THE DISABLED AMERICAN VETERANS, THAT THE MEMBER HAD ELECTED TO ACCEPT THE FINDINGS OF THE RECORD REVIEW PANEL. HOWEVER, MS. JOYNER ERRONEOUSLY HAD THE MEMBER SIGN A COPY OF THE FORM ACKNOWLEDGING FINDINGS OF A FORMAL HEARING INSTEAD OF THE FORM FOR ACCEPTANCE OF THE RECORD REVIEW PANEL FINDINGS. WHEN THE MEMBER WAS SUBSEQUENTLY CONTACTED TO SIGN THE CORRECT FORM, THE MEMBER REFUSED AND AGAIN DEMANDED A FORMAL HEARING.

A FORMAL HEARING WAS CONDUCTED ON 22 JUNE, 1999 AT BETHESDA, MARYLAND WITH COLONEL E. G. BEINHART, III, USMC, AS PRESIDING OFFICER, CAPTAIN E. [REDACTED] USN, AND CAPTAIN [REDACTED] MC, USN, AS PANEL MEMBERS. THE MEMBER WAS REPRESENTED BY LIEUTENANT [REDACTED] JAGC, USNR.

AT THE HEARING THE MEMBER SUBMITTED A PETITION REQUESTING TO BE FOUND UNFIT FOR DUTY WITH A DISABILITY RATING OF 60% UNDER V.A. CODE 5293 WITH PLACEMENT ON THE PDRL. THE MEMBER DECLINED TO PARTICIPATE IN THE HEARING EXCEPT TO READ A STATEMENT INTO THE RECORD, IN WHICH THE MEMBER ACCUSED THE HEARING PANEL OF PREVIOUSLY DEPRIVING HIM

OF DUE PROCESS WITH NO SPECIFIC ALLEGATIONS AGAINST A SPECIFIC MEMBER OF THE PANEL, AND OBJECTING TO ANY EVIDENCE BEING SUBMITTED BECAUSE HE FEELS A HEARING WAS PREVIOUSLY CONDUCTED ON 3 MARCH 1998. THE MEMBER DID NOT PRESENT ANY EVIDENCE OR EXHIBITS AND INDICATED THAT HIS APPEARANCE WAS ONLY TO OBJECT TO THE PROCEEDING. THE MEMBER FURTHER INDICATED HE FELT THE HEARING PANEL HAD NO JURISDICTION IN HIS CASE AT THIS TIME SINCE HE HAD ALREADY DECIDED TO APPEAL THE DECISION TO THE BOARD FOR CORRECTION OF NAVAL RECORDS. THE MEMBER AGAIN OBJECTED TO THE HEARING PANEL BECAUSE HE FELT IT PREVIOUSLY DEPRIVED HIM OF HIS DUE PROCESS AND RIGHTS.

AFTER CAREFUL REVIEW OF ALL THE AVAILABLE EVIDENCE AND BASED ON UNANIMOUS OPINION, THE FORMAL PEB FINDS THE MEMBER REMAINS UNFIT FOR FULL DUTY IN THE U.S. NAVY BECAUSE OF PHYSICAL DISABILITY. THE LAST TDRL EVALUATION OF NOVEMBER 1997 INDICATED THE MEMBER CONTINUES TO HAVE INCREASED DIFFICULTY WITH ACTIVITIES OF DAILY LIVING AND HAS DISCOMFORT RADIATING TO THE LEFT BUTTOCK AND LEG INTO THE LATERAL ASPECT OF THE FOOT. WITH STANDING AND WITH FURTHER INCREASES IN ACTIVITY HE GETS SOME DISCOMFORT INTO THE RIGHT LEG. THERE WAS EVIDENCE OF RESIDUAL HERNIATED DISK ON MRI AND EVIDENCE OF RADICULOPATHY IN THE L5-S1 DISTRIBUTION ON EMG. THIS LIMITS THE MEMBER'S ACTIVITIES AND WOULD INTERFERE WITH THE ADEQUATE PERFORMANCE OF REQUIRED MILITARY DUTIES.

THE TDRL REPORT INDICATED EXAM FINDINGS OF A HESITANT BUT NON-ANTALGIC GAIT, HOLDING HIS BACK STIFF IN GOING FROM THE SITTING TO THE STANDING POSITION, TENDERNESS TO PALPATION IN THE LEFT SACROILIAC JOINT AREA, FORWARD FLEXION LIMITED TO FINGERTIPS AT THE KNEES, EXTENSION TO 30 DEGREES WITHOUT SIGNIFICANT INCREASE IN PAIN, BUT SIGNIFICANT INCREASE IN LOW BACK PAIN WITH SIDE BENDING TO 20 DEGREES AND WITH FLEXION TO 30 DEGREES. STRAIGHT LEG RAISE TESTING WAS NEGATIVE FOR RADICULAR PAIN AND PRODUCED ONLY LOW BACK PAIN. THERE WAS HYPESTHESIA IN THE LATERAL S1 NERVE ROOT DISTRIBUTION IN THE LEFT FOOT, HYPESTHESIA ACROSS THE RIGHT FOREFOOT IN NO SINGLE NERVE ROOT DISTRIBUTION, MOTOR WEAKNESS OF 4+/5 IN LEFT FOOT AND TOE DORSIFLEXION WITHOUT SIGNIFICANT ATROPHY. HOWEVER, ALL OTHER MUSCLE GROUPS WERE 5/5 AND REFLEXES WERE SYMMETRIC, BUT THERE WAS INABILITY TO TOE WALK.

AN MRI IN OCTOBER OF 1996 WAS REPORTED AS BEING CONSISTENT WITH POSTOPERATIVE SCARRING IN THE L5-S1 HEMI LAMINOTOMY POSITION WITH CONTRAST ENHANCEMENT IN THAT AREA, A MODERATELY LARGE MAIN CENTRAL L5-S1 DISK HERNIATION WITH MODERATE TO SEVERE SPINAL CANAL STENOSIS, AND A LEFT PARACENTRAL DISK HERNIATION AT L4-5 WITH SOME CANAL STENOSIS. AN EMG OF 9 JULY 1997 WAS REPORTED AS CONSISTENT WITH

DENERVATION AND REINNERVATION IN LEFT LOWER EXTREMITY MUSCLE GROUPS INNERVATED BY L5 AND S1 NERVE ROOTS BUT WITH NO ABNORMALITIES IN THE RIGHT LOWER EXTREMITY. THE MEMBER WAS REPORTED TO HAVE GAINED WEIGHT UP TO 280 POUNDS. AT THE HEARING THE MEMBER WAS OBSERVED TO HAVE AN ANTALGIC GAIT FAVORING THE LEFT LEG AND USING A CANE IN THE RIGHT HAND. THE PREVIOUS REPORTS IN THE RECORD INDICATED THE MEMBER HAD BEEN WORKING PART TIME IN A LAW OFFICE AND GOING TO LAW SCHOOL PART TIME. AT THE HEARING THE MEMBER WAS ALSO OBSERVED TO BE NOTABLY OBESE. THE MEMBER HAS NOT REQUIRED FURTHER SURGERY OR HOSPITALIZATION WHILE ON THE TDRL.

THE ABOVE FINDINGS ARE CONSIDERED TO REPRESENT A DEGREE OF IMPAIRMENT BETWEEN THE 20% AND 40% RATINGS UNDER V.A. CODE 5293 BUT CLOSER TO THE 40% RATING. IT IS NOTED THAT THE MEMBER CONTRIBUTES TO HIS DEGREE OF IMPAIRMENT THROUGH HIS CONTINUED EXCESSIVE WEIGHT. HOWEVER, NO REDUCTION FOR NON-COMPLIANCE CAN BE MADE SINCE THERE IS NO DOCUMENTATION IN THE RECORD THAT THE MEMBER HAD BEEN COUNSELLED REGARDING THE EFFECTS OF OBESITY ON HIS CONDITION AND AFFORDED ADEQUATE DIETARY COUNSELLING. THEREFORE, THE DISABILITY IS MOST APPROPRIATELY SET AT 40% UNDER V.A. CODE 5293. THE MEMBER'S 5 YEARS OF TDRL ELIGIBILITY EXPIRED IN MAY; THEREFORE, THE DISABILITY IS CONSIDERED PERMANENT.